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No. 128, Original

IN THE

Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER ON MOTIONS FOR SUMMARY JUDGMENT

BRIEF OF NATIONAL PARKS CONSERVATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANT UNITED STATES OF AMERICA WITH RESPECT TO COUNT IV—GLACIER BAY

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INTEREST OF AMICUS CURIAE[1]

The National Parks Conservation Association ("NPCA") was founded in 1919, shortly after Congress passed the National Park Service Organic Act, 16 U.S.C. §§ 1-6 (1916) ("Park Service Organic Act"). NPCA was formed to advocate protection of the newly created national park system, consistent with Congress's mandate that the Executive Branch "conserve the scenery and the natural and historic objects and the wild life" in national parks and monuments and "provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* § 1.

In this case, the State of Alaska claims ownership of all of the tidal lands and marine submerged lands within Glacier Bay National Park and Preserve ("the Park"). The areas claimed by Alaska support a rich variety of wildlife and contain unique objects of historic and scientific interest that are integral to the Park's purposes.

Alaska asserts title under the "equal footing doctrine" and the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301 *et seq.*, because, it argues, Congress was not sufficiently explicit in expressing its intention that Glacier Bay be retained by the United States. Alaska effectively asks the Court to impose on Congress a new and heightened legal burden for federal retention of submerged lands, unsupported by this Court's well-established equal footing doctrine standards. If adopted by the Court, Alaska's new test not only would seriously threaten Glacier Bay, but also could be asserted to jeopardize preservation of important resources in other national parks.

NPCA and its 350,000 members have a substantial interest in ensuring that our national parks and monuments

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than NPCA, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

are preserved inviolate, as mandated by Congress. NPCA files this brief as amicus curiae to clarify Congress's intent that all of Glacier Bay National Park—including, most importantly, the "Bay" portion of the Park—be retained and protected by the United States, unimpaired for the benefit of present and future generations. Congress's intent being very plain, Alaska's claim of title to Glacier Bay necessarily is defeated.

STATEMENT OF THE CASE

Glacier Bay National Park is both spectacular and unique in its scenic beauty, the richness and diversity of its natural resources, and the opportunities for scientific study that it provides. The Park encompasses snow-capped mountain ranges rising to over 15,000 feet, coastal beaches with protected coves, deep fjords, coastal and estuarine waters, and freshwater lakes. Most notably, massive tidewater glaciers flow out of the mountains and into Glacier Bay, where huge blocks of ice up to 200 feet high break off or "calve" into the water.[2] The Park hosts an extraordinary spectrum of plant life, ranging from "pioneer species" in areas recently exposed by receding glaciers, to well-developed communities in older coastal and alpine ecosystems. The Park habitat also supports a variety of marine and terrestrial wildlife, including endangered humpback whales and large numbers of the renowned brown bear (also known as the grizzly bear), which can weigh well over 1,000 pounds.

Much of the surface area of Glacier Bay National Park is covered with water—in its frozen form, as vast areas of glacial ice, or in its liquid form, filling channels left behind as glaciers retreated over time. Marine waters make up nearly

[2] Except as otherwise indicated, the facts in this Statement of the Case regarding the Park's physical features, history, and plant and animal life are matters of public record, set forth on the National Park Service's Internet site. *See* National Park Service, Glacier Bay National Park and Preserve, Alaska, *available at* http://www.nps.gov/glba/ (last visited Sept. 7, 2004). There is no material dispute as to these facts in this case.

one-fifth of the Park. At present, Glacier Bay penetrates inland more than 60 miles, terminating in towering walls of ice at the numerous glaciers on the Bay's borders.[3] The Bay's waters ebb and flow in huge tides, which can change as much as 25 feet during a six-hour period. The lives of virtually all the animals in the Park are tied to the Bay's productive marine waters and the biologically rich tidal areas. As it was described by the National Park Service ("NPS") Director to Congress on the eve of Alaska's statehood, Glacier Bay is a "water park." *Hearings before the Senate Comm. on Interior and Insular Affairs*, 83d Cong. 1, 51 (1954) (US-IV-42) ("Hearings").

Glacier Bay is unique in one respect that is particularly important in this case. The Park's glaciers undergo rapid periods of accession and retreat, expanding or shrinking at tremendous rates that are unseen anywhere else in the world. In 1794, when Captain George Vancouver sailed his ship the Discovery through Icy Strait, what is now Glacier Bay was a mere five-mile-deep indent in a solid ice face that was in places 4,000 feet thick; glaciers covered nearly all of the area presently occupied by water. Yet, by 1879, John Muir reported that the giant wall of ice had retreated more than 30 miles from the mouth of the Bay. Many of the major glaciers in the Park have continued to retreat since then. *See* Appendix A (attached). In the future, many, if not all, of the waters in the Park today may again be filled by advancing glaciers.[4] Distinctions between "uplands," "tidal areas," and "submerged lands" are far less sharp and significant in this glacier ecosystem because the boundary between the

[3] A map of the Park is set forth in an official NPS publication, which is attached to this Brief as Appendix A and can be found at page 88 of the exhibit of the United States labeled "US-IV-8."

[4] Whether a glacier advances or retreats and the rate of its movement depend on many factors, including snowfall rate, topography, and climate trends. At present, glacial retreat continues on the Bay's east and southwest sides, but on the west side several glaciers are advancing onto lands that are currently submerged beneath Glacier Bay.

solid-water (frozen) and liquid-water areas of the Park is in hourly flux.

The Park supports a broad range of wildlife, including, in the uplands and tidal areas, brown bears, wolves, moose, mountain goats, marmots, wolverines, and numerous other mammal and bird species. Intermittently exposed submerged lands in tidal areas are rich in food supply and are favorite grazing areas for fauna in the Park. The waters of Glacier Bay are essential feeding grounds for endangered humpback whales and habitat for gray whales, killer whales, threatened Steller sea lions, and sea otters.[5] The submerged lands under Glacier Bay host a rich concentration of shellfish and marine plant life. As a national park, Glacier Bay is one of the few significant marine ecosystems that are protected from the depletions caused by large-scale commercial fishing, crabbing, and shellfish harvesting operations.

Because of the unique opportunity in Glacier Bay to study tidewater glaciers and the effects of their advancement and retreat, as well as its diverse and abundant wildlife, in 1925 President Coolidge proclaimed Glacier Bay a national monument pursuant to the National Monument Act, 16 U.S.C. §§ 431 *et seq.* *See* Proclamation No. 1733, 43 Stat. 1988 (1925) (US-IV-1) ("1925 Proclamation"). The 1925 Proclamation creating the Monument directed that it be administered by the Department of the Interior in accordance with the National Park Service Organic Act of 1916, *see id.*, thereby ensuring that it received the same level of protection as a national park. In 1939 the United States substantially expanded the reserved area of Glacier Bay, bringing the outer coast and the submerged lands beneath the three-mile territorial sea within the Monument's boundaries. *See* Proclamation No. 2330, 4 Fed. Reg. 1661 (1939) (US-IV-2) ("1939 Proclamation"). Later renamed Glacier Bay National Park and Preserve and slightly expanded, *see* 16 U.S.C.

[5] For more details, photographs, and illustrations of the Park's tidewater glaciers and the whales and other wildlife that inhabit Glacier Bay, see the front side of Appendix A (attached), the Park brochure.

§ 410hh-1(1), the Park is unique among our national parks in that it comprises an entire glacial and marine ecosystem, including the uplands, tidal areas, and submerged lands over which eleven tidewater glaciers are advancing or retreating. Indeed, the Park is so extraordinary that it, along with nearby Wrangell St. Elias National Park and Preserve, Kluane National Park and Preserve (Canada), and Tatshenshini-Alsek Park (Canada), has been designated by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) as a "World Heritage Site."[6]

The waters and lands now comprising Glacier Bay National Park were acquired in fee simple from Russia in 1867. *See United States v. Alaska*, 423 F.2d 764, 765-766 (9th Cir. 1970). The United States undisputedly had full ownership rights to those waters and lands from that time until Alaska's admission as a state in 1959. Alaska does not seriously dispute that through the Presidential Proclamations of 1925 and 1939, the United States intended to reserve *all* of the lands making up the Monument, including the tidal and submerged lands, as national park system properties. The single question to be decided here is whether Congress intended at the time of statehood that Glacier Bay National Monument's submerged lands, as well as its uplands, be retained by the United States.

SUMMARY OF ARGUMENT

1. Under the "equal footing doctrine" and the Submerged Lands Act, the determination whether the United States retained submerged lands within federal reserved areas is a question of "federal intent." *See United States v.*

[6] World Heritage Sites are protected by international treaty because of their "outstanding physical, biological and geological formations, habitats of threatened species of animals and plants and areas with scientific, conservation or aesthetic value." United Nations Educational, Scientific, and Cultural Organization, World Heritage, *available at* http://whc.unesco.org/pg.cfm?cid=160 (last visited Aug. 30, 2004). Glacier Bay is one of only thirteen U.S. national parks to be designated as a World Heritage Site.

Alaska, 521 U.S. 1, 36 (1997). If Congress's intent that such lands would be retained by the United States was "very plain," then the presumption that title passed to the state upon statehood will be overcome. *See id.* at 36 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). Congress's intent that submerged lands be retained by the United States may be demonstrated by (a) express language of statutory enactments at or prior to the time of statehood; (b) Congress's knowledge, at the time of statehood, of an existing Executive Branch reservation that included submerged lands; or (c) evidence that the submerged lands in question were necessary to the purposes of the federal reservation. *See id.* at 41-43; *Idaho v. United States*, 533 U.S. 262, 273-274 (2001).

2. Congress plainly intended that the United States retain the submerged lands in Glacier Bay National Park.

a) The Special Master correctly found that § 6(e) of the act granting Alaska statehood, *see* Act of July 7, 1958, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 340-341 ("Statehood Act"), expressed Congress's intent that all of Glacier Bay, as a national monument set aside for the protection of wildlife, was to be retained by the United States. *See* Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title at 271-272 (2004) ("Report"). This finding alone is sufficient to defeat Alaska's claim to Glacier Bay.

b) Congress's intention that the United States would retain and protect submerged lands within national park system areas such as Glacier Bay also was expressed in the plain language of the National Monument Act of 1906 and the National Park Service Organic Act of 1916. In those statutes, Congress delegated to the Executive Branch authority to designate national monuments of historic and scientific interest and mandated that, once designated, such national monuments would be protected by the Department of the Interior and preserved "unimpaired for the enjoyment of future generations." 16 U.S.C. § 1.

c) Congress was specifically aware of the reservation of submerged lands in Glacier Bay National Monument during the time period in which it considered Alaskan statehood. Between 1946 and 1958, Congress gave extensive consideration to the disposition of federal lands in Alaska, was informed that Glacier Bay National Monument contained submerged lands that were to be retained by the United States, debated eliminating or reducing the size of the Monument, and ultimately took no action affecting the status or scope of the Monument.

d) Finally, Congress's intent that all of Glacier Bay be retained by the United States is reflected in the very purposes for which Glacier Bay was reserved: the study of tidewater glaciers (which advance over and retreat from submerged lands), the study and protection of wildlife (which inhabit and feed in tidal areas and submerged lands), and the study and preservation of ancient forest remnants (which are found on submerged lands). Alaska's primary purpose in claiming title is to open up Glacier Bay to economic uses. State title necessarily is defeated because Alaska's goal of commercial exploitation of Glacier Bay fundamentally conflicts with the purposes for which it was reserved.

ARGUMENT

I. THE UNITED STATES RETAINS SUBMERGED LANDS WITHIN FEDERAL RESERVATIONS WHERE CONGRESS'S INTENT TO DO SO IS PLAIN.

Pursuant to the "equal footing doctrine" and the Submerged Lands Act, states are presumed to take title to the submerged lands beneath inland waters and the three-mile territorial sea upon statehood. *See Alaska*, 521 U.S. at 5-6. However, the Property Clause of the United States Constitution empowers the United States to retain submerged lands along with other reserved public lands at the time of statehood where it so elects. *See id.* at 34. "Whether title to submerged lands rests with a State," this Court has held, "is ultimately a matter of federal intent." *Id.* at 36. Submerged

lands are retained where Congress's "intention was definitely declared or otherwise made very plain." *Id.* (quoting *Holt State Bank*, 270 U.S. at 55). The same standard applies to claims under both the equal footing doctrine and the Submerged Lands Act. *See Alaska*, 521 U.S. at 35-36.

In evaluating whether Congress has recognized an Executive Branch reservation in a way that "demonstrates an intent to defeat state title," the Court considers "whether Congress was on notice that the Executive reservation included submerged lands." *Idaho*, 533 U.S. at 273-274. The Court also considers whether "defeating state title to submerged lands was necessary to achieve the United States' objective" in setting aside the land. *Alaska* 521 U.S. at 42-43. If "the purpose of the reservation would have been compromised if the submerged lands had passed to the State," title to the submerged lands shall be retained by the United States. *Idaho*, 533 U.S. at 274. In *Alaska*, for example, the Court determined that the National Petroleum Reserve included submerged lands and that in retaining the Reserve generally (in § 11(b) of the Statehood Act) Congress intended to retain the submerged lands specifically because "defeating state title . . . was necessary to achieve the United States' objective [of] securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands." 521 U.S. at 42-43. "The transfer of submerged lands at statehood—and the loss of ownership rights to the oil deposits beneath those lands—would have thwarted that purpose." *Id.* at 43.

In this case, Alaska purports to apply the standard set out in *Alaska* and discussed above but actually seeks to impose a new and heightened burden of proof on the United States. According to Alaska's argument, Congress was required to "explicitly recognize" Glacier Bay National Monument *in a statute at the time of statehood* in order to avoid reversion of the submerged lands in the Monument to the State. *See* Exceptions to Report of Special Master and Brief in Support for Plaintiff State of Alaska ("Alaska Br.") at 10.

This purported test is inconsistent with the standards established by the Court's directly applicable precedents.

Under the equal footing doctrine, there is no requirement that Congress express its intention to retain submerged lands in explicit statutory language enacted at the time of statehood. In *Idaho v. United States*, for example, the Court looked to the history of negotiations between the United States and the Coeur d'Alene Tribe prior to statehood in determining that Congress had plainly intended to retain submerged lands included in the reservation set aside for the Tribe by Executive Order prior to statehood. *See* 533 U.S. at 276-281. And in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), the Court did not consider the absence of a provision in the Utah Enabling Act of July 16, 1894, to be dispositive of the question whether the United States had retained title to submerged lands in a reservation pursuant to a federal law that allowed the United States Geological Survey ("USGS") to designate lands for sites for reservoirs and irrigation canals and ditches. The Court in *Utah* ultimately concluded that the law granting authority to the USGS and a subsequent law providing that selected sites remain segregated did not reveal an intent to defeat state title, but that was because those laws did not mention submerged lands and their purposes could be achieved without reserving submerged lands. *See id.* at 203, 208. Thus, under the equal footing doctrine, Congress's intent that the United States retain reserved submerged lands may be evidenced by laws and pronouncements predating the act granting statehood and the circumstances at the time of statehood, even if the statehood act itself is silent on this matter.[7]

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[7] In *Alaska*, the Court relied on provisions of the Statehood Act to demonstrate Congress's intent to retain the submerged lands in question, but it did not indicate that *only* provisions in the Statehood Act could show Congress's intent to retain federally reserved lands in Alaska. The Court in *Alaska* relied on the Statehood Act in part because it was not clear that the executive reservations were valid or final. There was some question whether the Pickett Act granted the President the authority to

The SLA did not give states any new or additional rights to lands beneath inland waters: "Since the Act does not extend to the States any interest beyond those afforded by the equal-footing doctrine, the State can no more base its claim . . . on the Submerged Lands Act than on that doctrine." *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324-325 (1973), *overruled on other grounds*, *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977). Rather, Congress passed the SLA in 1953 for the primary purpose of resolving certain claims made by the United States under the "paramount rights" doctrine to petroleum in lands beneath the three-mile territorial sea that had not been reserved or occupied by the United States prior to statehood. *See United States v. California*, 436 U.S. 32, 37 (1978). Section 1313(a) of the SLA lists several different exceptions to the general presumption that submerged lands pass to the states upon statehood, including an exception for lands "expressly retained by . . . the United States when the State entered the Union," 43 U.S.C. § 1313(a), which the Court has held to be no more or less stringent than the equal footing standard. *See Alaska*, 521 U.S. at 35-36. Section 1313(a) also excepts from state ownership "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. § 1313(a). With respect to reserved lands that were owned by the United States under a claim of right based on fee simple title and were actually occupied by the United States at the time the SLA was passed and at the time of

reserve the submerged lands in the National Petroleum Reserve, so looking to § 11(b) of the Statehood Act—which specifically stated that the United States owned the Reserve—was necessary. *See Alaska*, 521 U.S. at 43-45. And the proposed executive withdrawal of the Arctic National Wildlife Refuge had not been made final by the Secretary of the Interior, *see id.* at 46, so the Court considered instead whether § 6(e) indicated an intention to retain lands that were merely the subject of an application for a withdrawal, *see id.* at 55-60.

statehood, this exception applies.[8] When read collectively, the exceptions listed in § 1313(a) do not impose a more restrictive approach for determining federal retention under the SLA than the Court applies under the equal footing doctrine. Moreover, there would be no basis to argue that Alaska gained some additional rights because it was admitted after the SLA was passed. The section of the Statehood Act that made the SLA applicable to Alaska expressly provided that Alaska would have "the same rights as [did] existing States thereunder." Statehood Act § 6(m).

In sum, the general presumption that title to submerged lands passes to the states is overcome where Congress plainly intends that such lands be retained by the United States. Congress's intent can be determined in various ways, including consideration of (a) language in statutes enacted at the time of statehood, (b) the terms of other statutes and congressional pronouncements prior to statehood, (c) evidence that Congress was on notice of an Executive Branch reservation at the time of statehood, and (d) the purposes of the reservation and whether retention of submerged lands was necessary to achieve those purposes.

[8] The Court's holding in *California*, which declined to give effect to the last exception set out in § 1313(a), is not applicable in this case. Because the SLA was passed for the very purpose of overturning the United States' "paramount rights" claim to submerged lands beneath the territorial seas that had not been reserved or occupied prior to statehood, the Court held that the final exception in § 1313(a) could not have been intended to allow the federal government to retain ownership of a subset of those lands. *See California*, 436 U.S. at 37-41. In this case, the lands in question were not merely subject to the legal doctrine of paramount rights but were "actually occupied by the United States under claim of right" at the time of Alaska's statehood. The United States at all relevant times prior to statehood had fee simple ownership of those lands and dealt with them as an integral part of an established national monument that was occupied by the Department of the Interior under the Park Service Organic Act. The last exception in §1313(a) is applicable here based on the plain meaning of its terms.

II. CONGRESS VERY PLAINLY INTENDED THAT THE UNITED STATES RETAIN THE SUBMERGED LANDS IN GLACIER BAY.

A. Section 6(e) Of The Alaska Statehood Act Expressed Congress's Determination To Retain Glacier Bay For The Purpose Of Protecting Wildlife.

The Special Master—in a thorough and well-reasoned decision—determined that Congress intended to retain the submerged lands in Glacier Bay National Monument at the time Alaska became a state in 1959. The Master first concluded that "Glacier Bay Monument, as it existed at the time of statehood, clearly included the submerged lands within its boundaries." Report at 263-264. "The descriptions of the Monument" in the proclamations that established it, the Master found, "show that the Monument necessarily embraced submerged lands." *Id.* at 264. "In addition, excluding submerged lands would undermine the purposes of studying tidewater glaciers and studying and preserving wildlife and the remnants of ancient forests." *Id.* The Master also concluded that Congress specifically expressed its intent to retain Glacier Bay, including its submerged lands, in § 6(e) of the Alaska Statehood Act, which provides for the retention of "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife," Statehood Act § 6(e). *See* Report at 271-272.

Alaska has not raised an exception to the Special Master's conclusions that both the designation of Glacier Bay National Monument in 1925 and the expansion of the Monument in 1939 included submerged lands. *See* Alaska Br. at (i).[9] Instead, Alaska argues that it is not clear Congress intended to retain the submerged lands that undisputedly formed a part of the Monument at the time of statehood. But as the Special Master correctly found, § 6(e) of the Statehood Act expressed Congress's intent that *all* of Glacier Bay, as a national monument set aside for the protection of wildlife, was to be retained by the United States. This finding is compelled by the language used by Congress, and Alaska's contrary interpretation of § 6(e) could, if adopted, result in a massive and clearly unintended expansion of Alaskan ownership of federal reserved land in Alaska. NPCA anticipates that the United States will discuss the meaning of § 6(e) in depth, and NPCA therefore will not repeat those arguments here.

[9] In two sentences of a four-sentence footnote, Alaska cites its briefs filed before the Special Master and expresses a generalized disagreement with the Master's conclusion that the reservations of the Monument included submerged lands. *See* Alaska Br. at 10-11 n.4. But Alaska does not raise this issue in its exceptions or in its Summary of the Argument and states in the other two sentences of this footnote that the Court need not address this issue.

Although it was unnecessary for the Special Master to go beyond the express provisions of the Statehood Act to find sufficient evidence of congressional intent, this Court also should consider, in its exercise of *de novo* review, (1) other relevant congressional enactments, (2) Congress's specific consideration of Glacier Bay prior to 1959, and (3) the purposes for which Glacier Bay was reserved and the effects of state ownership on those purposes, all of which confirm the Special Master's conclusion that Alaska's claim fails as a matter of law.

B. Congress Intended That Submerged Lands Integral To Reserved National Parks And Monuments Would Be Retained And Protected By The United States.

Disposition of lands owned by the United States is governed by the Property Clause of the United States Constitution, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. Const. art. IV, § 3, cl. 2. Congress not only has legislative power over the public domain, but also exercises the powers of the proprietor therein, and it may deal with such lands precisely as an individual might deal with his or her own property. *Alabama v. Texas*, 347 U.S. 272, 273 (1954). Congress has "complete power" over

public lands that "necessarily includes the power to regulate and protect the wildlife living there." *Kleppe v. New Mexico*, 426 U.S. 529, 540-541 (1976). It is for Congress and not the courts to say how the public lands shall be administered. *United States v. City & County of San Francisco*, 310 U.S. 16, 26 (1940).

In the 19th and early 20th centuries, it was well established that the Executive Branch had authority to reserve public lands for appropriate purposes, even without congressional authorization. *See Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1867). The Executive Branch was charged with disposition of the public domain, and it reserved and withdrew lands "by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories." *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915). These orders were well known to Congress, and in not a single instance was an Executive reservation or withdrawal subsequently disapproved. *See id.*

It was against this backdrop that Congress enacted the National Monument Act of 1906, which provided:

> [t]he President of the United States is authorized, in his discretion, to declare by public proclamation . . . objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land . . . .

National Monument Act of 1906, Pub. L. No. 59-209, § 3060, 34 Stat. 225 (codified 16 U.S.C. § 431) (also known as the "Antiquities Act"). Pursuant to this authority, President Theodore Roosevelt proclaimed eighteen national monuments during his term of office ending in 1912, including major reservations such as Grand Canyon, Arizona; Mount Olympus, Washington; Natural Bridges, Utah; and Lassen Peak, California. *See Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1179 n.4 (D. Utah 2004). The broad authority of the Executive Branch to declare certain lands to be national monuments and reserve them under the Act was confirmed by the Court in *Cameron v. United States*, 252 U.S. 450, 455-456 (1920).

In 1916, Congress passed the National Park Service Organic Act of 1916, Pub. L. No. 64-235, 39 Stat. 535 (codified as amended at 16 U.S.C. §§ 1-18f), which created the National Park Service within the Department of the Interior to manage and protect national parks and national monuments. *See* 16 U.S.C. § 1. The Act established the national policy of protecting "the fundamental purpose of the said parks, *monuments*, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them *unimpaired* for the enjoyment of *future generations*." *Id.* (emphasis added).

The plain language of the National Monument Act and the Park Service Organic Act expresses Congress's intention that lands (including submerged lands) reserved as part of the national park system would be retained and protected by the United States. This conclusion is confirmed by the historical development of other important national parks. For example, Grand Canyon National Monument was established by Presidential Proclamation in 1906, prior to Arizona's admission into the Union. *See* Proclamation No. 794, 35 Stat. 2175 (1908). It was not designated as a national park until 1919. *See* Act of Feb. 26, 1919, Pub. L. 65-277, 40 Stat. 1175. The Arizona Statehood Act (June 10, 1910) did not specifically list submerged lands in the Grand Canyon National Monument as being retained by the United States—indeed, it did not mention the Grand Canyon at all. *See* Pub. L. No. 61-219, 36 Stat. 557. Yet the State of Arizona has never been viewed as having ownership rights to conduct mining operations or other activities in the bed of the Colorado River within Grand Canyon National Park in Arizona. *Cf. Lesoeur v. United States*, 21 F.3d 965, 967 n.2 (9th Cir. 1994) (noting dispute between United States and an Indian

Tribe, but not the State of Arizona, over ownership of the Colorado River in Grand Canyon National Park).

The reason such rights have not been asserted—and would have no basis in law—is that Congress's intent that the United States retain and protect all national parks and national monuments, including submerged lands therein, was made clear in the National Monument Act and the Park Service Organic Act. Under Alaska's version of the law, however, states could assert supposedly superior presumed rights to submerged lands in these and other national park system areas, in fundamental conflict with Congress's power under the Property Clause of the Constitution and Congress's mandate expressed in the Park Service Organic Act. With respect to national parks and monuments, including Glacier Bay, Congress plainly intended to retain all of the lands under the control of the Department of the Interior, unimpaired for future generations, and necessarily to defeat state title in doing so.

C. Congress Was On Notice At The Time Of Statehood That Glacier Bay National Monument Contained Submerged Lands And That The Monument Would Be Retained By The United States.

The Statehood Act divided the publicly held lands in the Territory of Alaska between the State and the United States. The Act gave Alaska title to "all property real and personal, title to which is in the Territory of Alaska or any of the subdivisions," but made clear that "[e]xcept as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." Statehood Act § 5. The Statehood Act also gave Alaska the opportunity to select, within 25 years after its admission, hundreds of thousands of acres of land to which title was retained by the United States. *Id.* § 6(a), (b). To be eligible for selection, however, most of the land had to be "vacant, unappropriated, and unreserved." *Id.* This apportionment of lands was the subject of extensive discussion in the period leading up to statehood.

Some members of Congress considering Alaska statehood were concerned that the statehood bill not "give Alaska just the remains after everybody else has picked it dry." Hearings, at 1 (US-IV-42). To address this concern, Congress considered a "reduction in the size of some of the Federal reservations, including the national parks and national monuments." *Id.* Before it could make such a reduction, however, Congress sought to gain "a broader understanding of the location of the lands reserved, and the views of the Department [of the Interior] as to the extent to which they could become restricted or whether they could be abolished." *Id.* at 10. The Committee on Interior and Insular Affairs called before it, among other officers of the United States, the Director of the National Park Service, Conrad Wirth. Mr. Wirth testified at length about the need to retain Glacier Bay National Monument under NPS management and protection. *See id.* at 46-53. Mr. Wirth opposed suggestions that the Monument was no longer needed because one of its glaciers had receded beyond the Monument's boundaries, noting that many other glaciers remained in the Monument. *See id.* at 47-48.

In the end, while a few members of Congress advocated reducing or eliminating Glacier Bay National Monument, Congress took no such action. In contrast, Old Kasaan Monument—which Mr. Wirth stated was no longer needed because the totem poles it was set aside to preserve had disappeared—was abolished. *See* Act of July 26, 1955, Pub. L. No. 84-179, 69 Stat. 380. During the period from 1946 through 1958 when the Alaska Statehood Act was under consideration, Congress eliminated at least eight national monuments,[10] but left Glacier Bay unaltered.

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[10] Father Millet Cross National Monument, N.Y. (Pub. L. No. 81-292, 63 Stat. 691, Sept. 7, 1949); Holy Cross National Monument, Colo. (Pub. L. No. 81-648, 64 Stat. 404, Aug. 3, 1950); Wheeler National Monument, Colo. (Pub. L. No. 81-652, 64 Stat. 405, Aug. 3, 1950); Shoshone Cavern National Monument, Wyo. (Pub. L. No. 83-360, 68 Stat. 98, May 17, 1954); Old Kasaan National Monument, Alaska (Pub. L. No. 84-179, 69 Stat. 380, July 26, 1955); Castle Pinkney National Monument, S.C. (Pub. L. No. 84-447, 70

During its deliberations regarding the future of Glacier Bay, Congress was expressly informed that the Monument contained submerged lands. Mr. Wirth described the Monument in his testimony as "a series of glaciers on a mountain range, with the Glacier Bay going up through the center" and provided an acreage figure that included submerged lands. Hearings, at 46 (US-IV-42); *see* John D. Coffman and Joseph S. Dixon, *Report on Glacier Bay National Park (Proposed), Alaska* at 1 (Dec. 20, 1938) (US-IV-9) ("Coffman & Dixon") (providing acreage figures). Mr. Wirth further explained that roads on the uplands of the Monument were unlikely to be necessary because the Monument was a "*water park*." *See* Hearings, at 51 (US-IV-42) (emphasis added).

To assist Congress in its deliberations regarding Alaska statehood and the apportionment of lands in Alaska, the Department of the Interior prepared an atlas titled "Alaska: Federal Land Withdrawals and Reservations." *See Alaska: Federal Land Withdrawals and Reservations* (US-IV-46) ("Atlas"). This atlas was made available at the 1954 hearing at which Mr. Wirth testified about whether any national monuments could be reduced or eliminated prior to statehood, *see* Hearings, at 10 (US-IV-42), and a version of the atlas was entered into the Congressional Record in 1957, *see Hearings Before the Subcom. on Territorial and Insular Affairs of the Com. on Interior and Insular Affairs*, 85th Cong. 1, 195-196 (1957) (US-IV-45). The atlas shows that Glacier Bay National Monument was one of the areas reserved by the United States. *See* Atlas (US-IV-46). More importantly, the atlas shows that the boundaries of the Monument extended beyond the outer coastline to include open ocean and submerged lands outside of Glacier Bay and that the boundary cut through Cross Sound and Icy Strait, including some of the waters and submerged lands but not

Stat. 61, Mar. 29, 1956); Verendrye National Monument, N.D. (Pub. L. No. 84-846, 70 Stat. 730, July 30, 1956); and Fossil Cycad National Monument, S.D. (Pub. L. No. 84-891, 70 Stat. 898, Aug. 1, 1956).

others within the Monument. *See id.* The atlas shows that Congress knew that Glacier Bay National Monument was being retained by the United States and knew that the Monument contained submerged lands. Indeed, this Court held in *Alaska* that the very same atlas, by including the Arctic National Wildlife Range, put Congress "on notice" at the time it passed the Statehood Act that the federal government had reserved the submerged lands depicted in the map of the Range. *See* 521 U.S. at 56 & n.2.

Congress also was aware that the United States intended to retain Glacier Bay National Monument as a result of its consideration of prior versions of the proposed statehood bill. House Resolution 206 would have transferred to Alaska "all public property and all vacant unappropriated lands" except, *inter alia*, "Mount McKinley National Park" and "Glacier Bay National Monument, as established, described, and delimited in the proclamation of the President of the United States dated February 26, 1925 (43 Stat. 1988)." H.R. 206, 80th Cong. at 2 (1947) (US-IV-43). In response to a complaint that this bill would have transferred to Alaska Katmai National Monument (because it was not specifically listed as retained), the Delegate who introduced the bill (E.L. Bartlett) explained that Katmai was no longer of any special significance because the natural phenomena that justified its creation had ceased to exist. *See* Letter from Bartlett to Packard of Feb. 3, 1947, at 1-2 (US-IV-44). In contrast, Delegate Bartlett observed that "with one trifling exception" no one had suggested that "the status of Glacier Bay National Monument" be changed because it had "splendid potentialities." *Id.* at 2.[11]

In sum, Congress's knowledge about and treatment of Glacier Bay during the period prior to statehood demon-

[11] Congress's decision to move from a bill (House Resolution 206) that granted all lands to Alaska except those specifically listed by name to a bill (the Statehood Act) that instead described general categories of property shows that Congress felt no need to list properties by name in order to retain them.

strate that Congress intended the United States to retain title to *all* of the Monument.

D. Federal Retention Of The Submerged Lands In Glacier Bay National Monument Was Necessary To Further The Purposes For Which The Monument Was Created.

1. The Purposes Of Glacier Bay National Monument Required The Inclusion Of Submerged Lands.

The 1925 Proclamation establishing Glacier Bay National Monument stated that it was being reserved to provide a unique opportunity for the scientific study of (1) "glacial behavior," (2) the "resulting movements and developments of flora and fauna," and (3) "certain valuable relics of ancient interglacial forests." 43 Stat. at 1988-1989 (US-IV-1). The 1939 expansion also was intended to further these purposes. *See* 1939 Proclamation, 4 Fed. Reg. at 1661 (US-IV-2) (noting protection of "objects of scientific interest" in the Monument). Each of these purposes would have been undermined by dividing Glacier Bay National Monument into two parts, one upland and one submerged, and transferring title to the submerged lands to Alaska.

First, as the Special Master concluded, the study of the "tidewater glaciers" present in the Monument required the preservation of the submerged land portion of the Monument. *See* Report at 246-248. Tidewater glaciers advance and retreat over time. *See id.* at 246. Over the past two hundred years, the glaciers of Glacier Bay have experienced profound changes. In 1794, glaciers covered almost the entirety of Glacier Bay. *See* Dennis C. Trabant, *Expert Witness Report for Glaciology Relating to Claims to Submerged Lands in Glacier Bay, Alaska* at 2 (US-IV-5) ("Trabant"). Between the middle of the 18th Century and the beginning of the 20th Century, one particular glacier, Johns Hopkins Glacier, retreated as much as 100 kilometers, or 62 miles. *See* Bruce F. Molnia, *The State of Glacier Science and its Relationship to the Submerged Lands Adjacent to and Beneath the Tidewater Glaciers of Glacier Bay at the Time of the Founding and Expansion of Glacier Bay National Monument, Alaska* at 9 (US-IV-4). The movement of glaciers and the resulting covering and uncovering of land with liquid water are reason enough to conclude that a monument designed to facilitate the study of glaciers must include currently submerged lands. Because tidewater glaciers in Glacier Bay rest on the very submerged lands at issue in this case, *see* Declaration of Tomie Patrick Lee at 4 (US-IV-8), studying the movement of glaciers requires the study of the sea floor, *see* Trabant at 6 (US-IV-5). "Glacier Bay would not be an effective area for the study of tidewater glaciers if the submerged lands were excluded." *Id.* at 7; *see* Report at 247 (adopting Trabant's conclusion). As the Master observed, as far back as 1914 scientists recognized the relationship between glaciers and the sea floor. *See* Report at 248 n.70.

Second, retention of the submerged lands in Glacier Bay was necessary for the study and protection of the wildlife within the Monument. The 1925 Proclamation stated that a purpose of the Monument was to study "the movements and developments of flora and fauna" and made clear that the Monument was to be supervised, managed, and controlled by the National Park Service pursuant to the Park Service Organic Act of 1916, which required the Monument to be administered "to conserve . . . the wild life therein," 16 U.S.C. § 1. *See* 1925 Proclamation, 43 Stat. at 1988 (US-IV-1).[12] As the Master found, excluding submerged lands from the Monument would have undermined the protection of wildlife including, specifically, brown bear. *See* Report at 253-255. Numerous animals use both the uplands of the Park and the submerged lands. Brown bears "eat barnacles and rye and sedge grasses on tidelands and swim to islands to gather

[12] Alaska's suggestion that a purpose of the Monument was to allow scientists to *study* wildlife but not to *protect* wildlife, *see* Alaska Br. at 21, should be rejected out of hand, as it was by the Special Master, *see* Report at 254.

seabird eggs." *Id.* at 254 (citing Victor G. Barnes, Jr., *Brown Bear Use of Marine Habitats in Alaska with Emphasis on Glacier Bay* at 6-12 (2000) (US-IV-6)). Many marine animals—such as the whales, porpoises, and seals mentioned in the 1938 report on the proposed expansion of the Monument, *see* Coffman & Dixon at 9, 10 (US-IV-9)—live in Glacier Bay itself.

Third, retention of the submerged lands at the time of statehood was necessary to facilitate the scientific study of "certain valuable relics of ancient interglacial forests." 1925 Proclamation, 43 Stat. 1988-1989 (US-IV-1). As the Master explained, the "retreat of some glaciers in the Glacier Bay area during the 19th and early 20th century revealed remnants of ancient trees that had been buried underneath ice for millennia." Report at 251. Some of these remnants "rest on submerged lands." *Id.* Alaska suggests that retention of all of the submerged lands in Glacier Bay was not necessary to protect the ancient forests presumably because the forests are not located on all of the submerged lands in the Park. *See* Alaska Br. at 10-11 n.4. As the Master determined, however, the proper inquiry is not whether any particular square foot of submerged land was necessary to the Monument but whether exclusion of the submerged lands as a whole would impair the Monument. *See* Report at 252 (citing *Alaska*, 521 U.S. at 40-41).

The submerged lands beneath Glacier Bay were not just accidentally included in the Monument's boundaries. They were included because they were integral to the purposes of the Monument: studying glaciers, wildlife, and remnants of ancient forests.

2. State Ownership Would Conflict With The Purposes For Which Glacier Bay Was Reserved.

Alaska's stated rationale for asserting title to the submerged lands beneath Glacier Bay (halting and reversing the phase-out in the Bay of commercial fishing), its expressed desires for future uses of the Bay (increased cruise ship traffic), and its actions in other protected areas illustrate the fundamental inconsistency of state ownership with the Park's purposes. State ownership of the submerged lands beneath Glacier Bay would result in significant risk of impairment of Glacier Bay National Park and, at a minimum, would likely result in disputes and protracted litigation between Alaska and the United States over management of the Park.

a. As a part of the National Park System, Glacier Bay National Park is subject to federal legislation and regulations designed to protect and conserve the natural objects and wildlife within the Park, including the Park Service Organic Act itself. *See* Robert B. Keiter, *Symposium: The National Park System: Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 Denv. U. L. Rev. 649, 675 (1997) (The Park Service Organic Act's "'nonimpairment' standard indicates that resource preservation responsibilities should take precedence over public use in the event of a conflict.").

Management of Glacier Bay by the NPS must conform to the requirements of the Endangered Species Act, which requires federal agencies to ensure that agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *See* 16 U.S.C. § 1536(a)(2). For example, the Act provides protection for endangered humpback whales and threatened Steller sea lions, both of which are found in the waters of Glacier Bay. The NPS also is subject to the National Environmental Policy Act ("NEPA"), which requires all federal agencies to prepare an environmental impact statement regarding proposed major federal actions that significantly affect the environment. *See* 42 U.S.C. § 4332(2)(C). Glacier Bay National Park is subject to the 1976 Mining in the Parks Act, which authorizes the Secretary of the Interior to promulgate regulations governing mining operations on National Park System lands in order "to preserve for the benefit of present and future generations the pristine beauty of areas of the National Park Sys-

tem, and to further the purposes of" the Organic Act. *See* 16 U.S.C. § 1902. The regulations promulgated pursuant to that Act prohibit mining absent approval of a plan of operations, which must include an environmental analysis. *See* 36 C.F.R. § 9.9(a), (b)(9). The Wilderness Act of 1964, which prohibits most development in designated wilderness, *see* 16 U.S.C. § 1133(c), also applies to Glacier Bay, parts of which have been so designated.

In addition to these generally applicable federal laws, statutes applicable specifically to Glacier Bay govern commercial fishing in the Park. An appropriations bill passed in 1998 and modified in 1999 closed some upper portions of the Bay entirely to fishing, sharply limited fishing within other portions of the Bay to grandfathered fishermen (who received nontransferable, lifetime permits to fish only for Tanner crab, halibut, and salmon), and provided compensation to affected fishermen. *See* Omnibus Consolidated and Emergency Supplemental Appropriation Act for FY 1999, Pub. L. No. 105-277, § 123, 112 Stat. 2681, 2681-259 - 2681-261 (1998) (codified 16 U.S.C. § 410hh-NOTE); Emergency Supplemental Appropriations, Pub. L. No. 106-31, § 501, 113 Stat. 57, 72-73 (1999); *see also* 36 C.F.R. § 13.65(a). Once the grandfathered fishermen cease fishing, all commercial fishing in the Bay will be prohibited, making Glacier Bay the only marine coastal environment in Alaska that is entirely protected from the adverse effects of commercial fishing.

Federal regulations promulgated by the National Park Service pursuant to the Park Service Organic Act govern activities in Glacier Bay and protect the Park's natural resources. Current regulations limiting the entry of boats (including fishing vessels and cruise ships) into Glacier Bay were extensively reviewed in a recent Environmental Impact Statement.[13] To enter the Bay a commercial vessel

[13] *See* Vessel Quotas and Operating Requirements—Final Environmental Impact Statement, *available at* http://www.nps.gov/glba/InDepth/learn/preserve/issues/vessels/VQOR/feis_2003.htm (last visited Sept. 7, 2004).

must have a permit issued by the Park, which requires cruise ship companies to implement an approved "pollution minimization plan." 36 C.F.R. § 13.65(b)(2)(i), (ii). The Park is permitted to issue a limited number of permits; only two cruise ships are allowed per day. *Id.* § 13.65(b)(2)(v). The regulations generally prohibit the operation of a vessel within one-quarter nautical mile of a whale, provide for speed limitations in designated "whale waters," and close some waters to vessels entirely. *Id.* § 13.65(b)(3)(i), (iv), (vi), (vii). They also prohibit "[o]ff-boat activity from a commercial vessel," *id.* § 13.65(b)(2)(F), impose noise restrictions, *id.* 13.65(b)(3)(viii), and limit visible vessel emissions, *id.* § 13.65(b)(4).

Hunting is forbidden in the Park (except in the Preserve), as is "feeding, touching, teasing, frightening or intentional disturbing of wildlife." *See* 36 C.F.R. § 2.2(a)(1), (2).[14] Use of aircraft is limited to designated areas for limited purposes. *See id.* § 2.17; 43 C.F.R. § 36.11(f). Use of motor vehicles is prohibited "except on park roads, in parking areas and on routes and areas designated for off-road motor vehicle use." 36 C.F.R. § 4.10(a). Operating a business or engaging in building construction requires a permit. *See id.* §§ 5.3, 5.7.

b. Alaska's approach to resource management contrasts sharply with the federal approach described above. Alaska has proclaimed by statute that it has "not assented to federal control of fish and game in Glacier Bay National Park and Preserve or the navigable waters within or adjoining the park and preserve." Alaska Stat. § 16.20.010(a)(2)(B). However, Alaska has not taken any steps to designate those submerged lands as protected under state law.[15] Rather,

[14] *See also* Glacier Bay National Park & Preserve, Basic Park Regulations, *available at* http://www.nps.gov/glba/InDepth/visit/regs.htm (last visited Aug. 25, 2004).

[15] The State has not designated Glacier Bay as a State Park, *see* Alaska Stat. § 41.21.110-§ 41.21.180, a State Game Refuge, *see id.* § 16.20.010-§ 16.20.080, a State Fish and Game Critical Habitat Area, *see*

Alaska's stated intentions with respect to Glacier Bay and its previous actions in other protected areas indicate that Alaska likely would attempt to exploit the natural resources of Glacier Bay for commercial purposes.

In 1999 then-Governor Tony Knowles stated: "It's time to resolve, once and for all, the issue of where federal jurisdiction ends and state jurisdiction begins in Southeast Alaska." *See* Svend Holst, *Knowles Sues for Control over Bay*, The Juneau Empire, Nov. 26, 1999, at 1. He explained that Alaska's need to preserve commercial and subsistence fishing in Glacier Bay had motivated Alaska's suit to quiet title to the submerged lands. *See* Mark Sabbatini, *State Sues over Glacier Bay*, The Juneau Empire, Mar. 4, 1999.

Alaska has clearly stated its desire to increase the amount of cruise ship traffic in Glacier Bay. In a recent letter to the Department of Interior, Governor Murkowski said: "Increased entries would be good for the economy of Southeast Alaska and would enable thousands of additional Americans to see the wonders of Glacier Bay." *See* Letter from Murkowski to Griles of Mar. 25, 2004, at 4. In its written comments on NPS' Draft Environmental Impact Statement regarding vessel quotas and regulations, Alaska took the position that use of motorized vehicles in the Bay is a "traditional activity" that, under the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq.*, must be permitted.[16] Increased cruise ship and vessel traffic in Glacier Bay would create substantial risks of impairment of Park resources. In July 2001 a cruise ship hit and killed a

id. § 16.20.500-§ 16.20.690, or a State Game Sanctuary, *see id.* 16.20.090-16.20.162.

[16] *See* Letter from Murkowski to Swanton of May 14, 2003, at 2, 4, 5, *available at* http://www.nps.gov/glba/InDepth/learn/preserve/issues/vessels/ VQOR/files/FEIS/Volume2/Appendices/AppendixM.pdf at 7, 11, 13 (last visited Aug. 25, 2004).

pregnant humpback whale.[17] Smoke stack emissions from cruise ships can leave a visible haze in the air, and in Southeast Alaska from 1993 to 1999, there were at least 14 vessel accidents, including one in Glacier Bay.[18]

Under state management, there is also the prospect that floating lodges could be constructed in Glacier Bay. In Prince William Sound, which is surrounded by Chugach National Forest, the Alaska Department of Natural Resources has approved construction of eight floating inns in the tidelands.[19] State management of Glacier Bay might also permit "mariculture"—commercial farming of oysters, clams, mussels, and other shellfish—to be introduced to the Bay. A 2002 state law required state agencies to expand opportunities for private mariculture operations.[20] Moreover, the Alaska Department of Fish and Game recently "announced plans to lift a three-year-old ban on [new] clam farms in the Kachemak Bay and Fox River Flats Critical Habitat areas" and allow new leases for mariculture.[21] Such operations are

[17] *See Park Confirms Pregnant Humpback Was Killed by Cruise Ship*, Kenai Peninsula Online, Sept. 26, 2001, *available at* http://www.peninsulaclarion.com/stories/092601/ala_092601alapm0010001.shtml (last visited Aug. 25, 2004).

[18] *See* Vessel Quotas and Operating Requirements, Final Environmental Impact Statement, § 4.61, *available at* http://www.glba.ene.com/files/FEIS/Volume1/MainDocument/Chapter4/Sections/Section4.6.pdf (last visited Aug. 25, 2004); Needs Assessment for a Major Fuel Oil Spill, Glacier Bay National Park and Preserve § 4.2, at 10-11 (May 2000), *available at* http://www.nps.gov/glba/InDepth/learn/preserve/issues/vessels/spill_assessment.pdf (last visited Aug. 25, 2004).

[19] *See* Sally Deneen, *Alaska's Prince William Sound Braces for Nonstop Tourism*, The Environmental Magazine, June 17, 2003, *available at* http://www.enn.com/news/2003-06-17/s_4777.asp (last visited Aug. 25, 2004).

[20] *See* Jackie Timothy, Alaska Department of Fish and Game, 2002 Annual Mariculture Report at 5 (June 2003), *available at* http://www.cf.adfg.state.ak.us/geninfo/pubs/rir/5j03-09.pdf (last visited Aug. 25, 2004).

[21] Hal Spence, *Clam Farm Ban Could Be Lifted*, Kenai Peninsula Online, July 29, 2004, *available at* http://www.peninsulaclarion.com/sto-

currently carried out in Kachemak Bay State Critical Habitat Area.[22]

It is also reasonable to expect that if Alaska owned the submerged lands within the Park it would attempt to permit exploration for and extraction of any minerals or other natural resources that might be present. Alaska's current Governor "ran for election in 2002 on a natural resources development platform" and sees more oil production as the key to the State's fiscal woes.[23] That natural resources may be located within an environmentally-sensitive protected area does not dampen the State's enthusiasm for development. While calls for oil drilling in the Arctic National Wildlife Refuge recently have been rejected by Congress, Alaska's current Governor has long favored drilling there. *See* Jessica Mathews, *Get Real, Alaska; ANWR Is Not the Answer*, Anchorage Daily News, Oct. 28, 1995, at 6B. Following a decision by the Alaska Supreme Court enjoining oil exploration in Cook Inlet between the Redoubt Bay Critical Habitat Area and the Trading Bay Fish and Game Refuge, the State Legislature stepped in and passed a bill effectively terminating a lawsuit related to that project.[24] Indeed, the last two

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http://www.peninsulaclarion.com/stories/072904/new_072904new002001.shtml (last visited Aug. 25, 2004).

[22] *See* Tom Kizzia, *State Offers New Mariculture Sites*, Anchorage Daily News, Dec. 30, 2003, *available at* http://www.adn.com/front/story/4565205p-4538051c.html (last visited Aug. 25, 2004).

[23] Marsha Herbst, *Natural Gas, Oil Exploration Top Agenda*, Juneau Empire, Jan. 16, 2003, *available at* http://www.aklegislature.com/hitchhiker/2004/stories/natgasoil.shtml (last visited Aug. 31, 2004); Mike Chambers, *Murkowski Seeks Solutions in Oil Drilling*, Juneau Empire, Oct. 28, 2002, *available at* http://www.aklegislature.com/stories/102802/murkowski.shtml. (last visited Aug. 31, 2004).

[24] *See* Cathy Brown, *Governor Signs Bill Limiting Environmental, Other Lawsuits: Environmentalists Say Measure Shuts Courthouse Door to the Public, but not to Industry*, Juneau Empire, June 15, 2003, *available at* http://www.aklegislature.com/stories/061503/environbill.shtml (last visited Aug. 31, 2004); Hal Spence, *Amendment May Allow State To Waive Review for Forest Oil Cook Inlet Well: Senate Tries To Reverse Court Action*, Kenai Peninsula Online, May 13, 2002, *available at*

times the State of Alaska has sought a declaration that it, not the United States, owned submerged lands within a federal reserve, the motivation behind Alaska's claim was a desire to drill for oil or gas in submerged lands in the protected areas. *See Alaska*, 521 U.S. at 4-5 (oil in the Arctic National Wildlife Reserve); *Alaska*, 423 F.2d at 765-766 (oil and gas beneath Tustumena Lake in the Kenai Moose Range).

c. The differing approaches of the federal government and Alaska to resource development would likely lead to substantial conflicts over Park management if Alaska were granted title to the submerged lands in the Park. This Court has indicated that ownership of submerged lands generally provides the authority to control navigation, fishing, and other commercial activity. *See Utah Div. of State Lands*, 482 U.S. at 195. The SLA, moreover, grants States "the right and power to manage, administer, lease, develop, and use . . . in accordance with applicable State law" lands "beneath navigable waters within the boundaries of the respective States" and "the natural resources within such lands and waters." 43 U.S.C. § 1311(a). While Congress would retain substantial authority to regulate activities in Glacier Bay,[25] and the National Park Service would retain its authority under existing federal regulations, Alaska would be expected to resist and dispute federal restrictions. At a minimum, state ownership of the submerged lands beneath Glacier Bay would lead to uncertainty regarding the respective authority of the State and the NPS over an ecosystem that could effectively be divided in two.

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http://peninsulaclarion.com/stories/051302/new_0513020003.shtml (last visited Aug. 31, 2004).

[25] The United States could regulate the navigable waters of Glacier Bay and any commercial activity in the Bay (such as cruise ship traffic and commercial fishing) under Congress's commerce clause authority, *see, e.g., Gibbons v. Ogden*, 22 U.S. 1, 89 (1824); *see generally United States v. Lopez*, 514 U.S. 549 (1995), and could "regulate conduct off federal land that interferes with the designated purpose of that land" under Congress's Property Clause authority, *Minnesota v. Block*, 660 F.2d 1240, 1249-1250 (8th Cir. 1981).

The Boundary Waters Canoe Area ("BWCA") in Minnesota, for example, "[h]as long been a source of conflict between state and federal regulatory authority as a result of the area's bifurcated state federal ownership structure." Blake Shepard, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property To Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. Envtl. Aff. L. Rev. 479, 507 (1984). Because Minnesota owns the beds of lakes and streams while the United States owns most of the uplands in the BWCA, attempts at divided management have "created a great deal of confusion and litigation." *Id.* at 509. Similar confusion and litigation would be expected if this Court were to hold that Alaska owned the submerged lands in Glacier Bay. As a result, scarce NPS resources would be invested in defending park values from proposed state actions rather than in the Park's current resource protection program.

Glacier Bay is the largest protected marine environment in the United States and one of the most important marine research and protected areas in the world. The essential physical and scientific values of the Park lie in the intersection between the glacial environment and the marine environment. It is, after all, *Glacier Bay* National Park. The proclamations creating and expanding Glacier Bay included submerged lands because they were necessary to achieve the Monument's purposes of protecting and studying wildlife, glaciers, and ancient forest remnants. The fundamental conflict between the Park's long-established purposes and the State's goals in asserting title, which were as predictable in 1959 as they are apparent today, confirms Congress's intent that the submerged lands in Glacier Bay be retained and protected by the United States as an essential part of the Park.

CONCLUSION

With respect to Count IV, the decision of the Special Master should be adopted in full.

Respectfully submitted,

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Counsel for Amicus Curiae National Parks Conservation Association

September 10, 2004

Glacier Bay

Official Map and Guide

Glacier Bay National Park and Preserve
Alaska

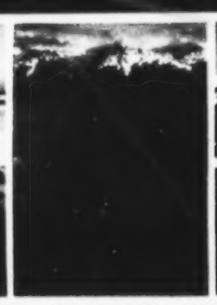
National Park Service
U.S. Department of the Interior

Appendix A (US-IV-8)

Brief of Amicus Curiae
National Parks Conservation Association

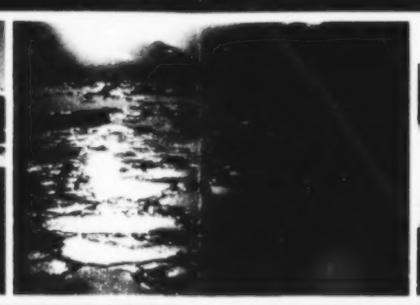
Alaska v. United States, No. 128, Original

Icebergs grounded on an island remind you how recently the world of ice prevailed in Glacier Bay



Streams immediately below glaciers often exhibit this characteristic braided pattern

The Alsek River winds through the northwestern reaches of the Park and Preserve



Pan ice shimmers on Johns Hopkins Inlet

Arc-shaped stress patterns on McBride Glacier hint at a glacier's powers

A mature spruce-hemlock forest carpets Bartlett Cove

A peaceful shoreline at Bartlett Cove holds clues to the landscape's glacial origin

Cover: Sunset from the Beardslee Islands. Photo by Tom Bean

Tidewater Glaciers

Enter Glacier Bay and you cruise along shorelines completely covered by ice just 200 years ago. Explorer Capt. George Vancouver found Icy Strait (see map) choked with ice in 1794, and Glacier Bay was a barely indented glacier. That glacier was more than 4,000 feet thick, up to 20 miles or more wide, and extended more than 100 miles to the St. Elias Range of mountains. But by 1879 naturalist John Muir found that the ice had retreated 48 miles up the bay. By 1916 the Grand Pacific Glacier headed Tarr Inlet 65 miles from Glacier Bay's mouth. Such rapid retreat is known nowhere else. Scientists have documented it, hoping to learn how glacial activity relates to climate changes.

Worldwide, the glacial facts are staggering. Glaciers and polar ice store more water than lakes and rivers, groundwater, and the atmosphere combined. Ten percent of our world is under ice today, equaling the percent being farmed. If the world's ice caps thawed completely, sea level would rise enough to inundate half the world's cities. The Greenland and Antarctic ice caps are 2 miles thick. Alaska is four percent ice.

Glaciers form because snowfall in the high mountains exceeds snowmelt. The snowflakes first change to granular snow—round ice grains—but the accumulating weight soon presses it into solid ice. Eventually, gravity sets the ice mass flowing downslope at up to 7 feet per day. The park includes some 12 tidewater glaciers that calve into the bay. The show can be spectacular. As water undermines some ice fronts great blocks of ice up to 200 feet high break loose and crash into the water. Johns Hopkins Glacier calves such volumes of ice that it is seldom possible to approach its ice cliffs closer than about 2 miles. The glaciers seen here today are remnants of a general ice advance—the Little Ice Age—that began about 4,000 years ago. This advance in no way approached the extent of continental glaciation during Pleistocene time. The Little Ice Age reached its maximum extent here about 1750, when general melting began. Today's advance or retreat of a glacier snout reflects many factors: snowfall rate, topography, and climate trends. Glacial retreat continues today on the bay's east and southwest sides, but on its west side two glaciers are advancing.

The snowcapped Fairweather Range supplies ice to all glaciers on the peninsula separating Glacier Bay from the Gulf of Alaska. Mount Fairweather, the range's highest peak, stands at 15,320 feet. Near Johns Hopkins Inlet, several peaks rise from sea level to 6,520 feet within just 4 miles of shore. The great glaciers of the past carved these fjords, or drowned valleys, out of the mountains like great troughs. Landslides help widen the troughs as the glaciers remove the bedrock support on upper slopes.

Huge icebergs may last a week or more, and they provide perches for bald eagles, cormorants, and gulls. Close by, kayakers have heard the stress and strain of melting: water drips, air bubbles pop, and cracks develop. Colors betray a berg's nature or origin. White bergs hold many trapped air bubbles. Blue bergs are dense. Greenish-blackish bergs may have calved off glacier bottoms. Dark-striped brown bergs carry morainal rubble from the joining of tributary glaciers or other sources. How high a berg floats depends on its size, the ice's density, and the water's density. Bergs may be weighed down, submerged even, by rock and rubble. A modest-looking berg may suddenly loom enormous—and endanger small craft—when it rolls over. Keep in mind that what you see is just the tip of the iceberg.

Biosphere Reserve and World Heritage Site

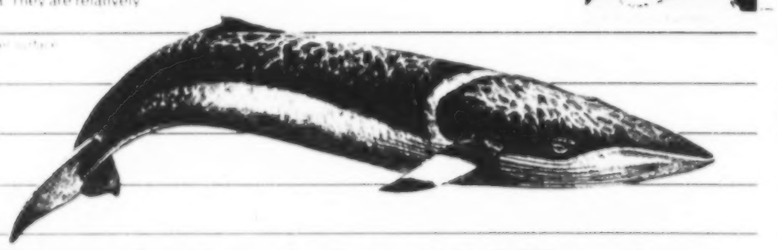
Glacier Bay National Park and Preserve was designated a national monument in 1925. Its purpose was to preserve the glacial environment and plant communities for public enjoyment, scientific study, and historic interest. Expanded several times, Glacier Bay was redesignated a national park and preserve in 1980. In 1986 the park was named a Biosphere Reserve by UNESCO. In 1992 it was listed as a World Heritage Site, the principal international recognition given to natural and cultural areas of universal significance. This dual status shows that the international community values the uniqueness of this dynamic glacial landscape, a major ecosystem that protects the diversity of life.

Biosphere Reserve MaB

World Heritage Site

Minke

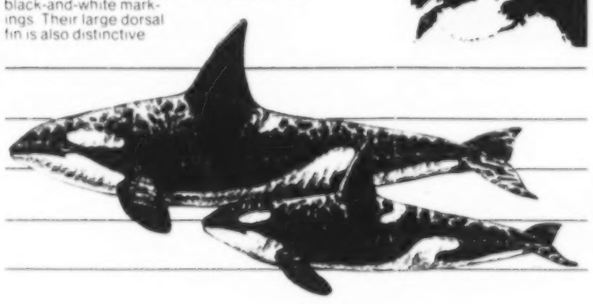
Minke whales occur throughout many oceans and are common from southern California to the Bering Sea and Chukchi Sea. They are relatively uncommon in the Glacier Bay area. In diving, the Minke shows its relatively small dorsal fin last above water



Orca

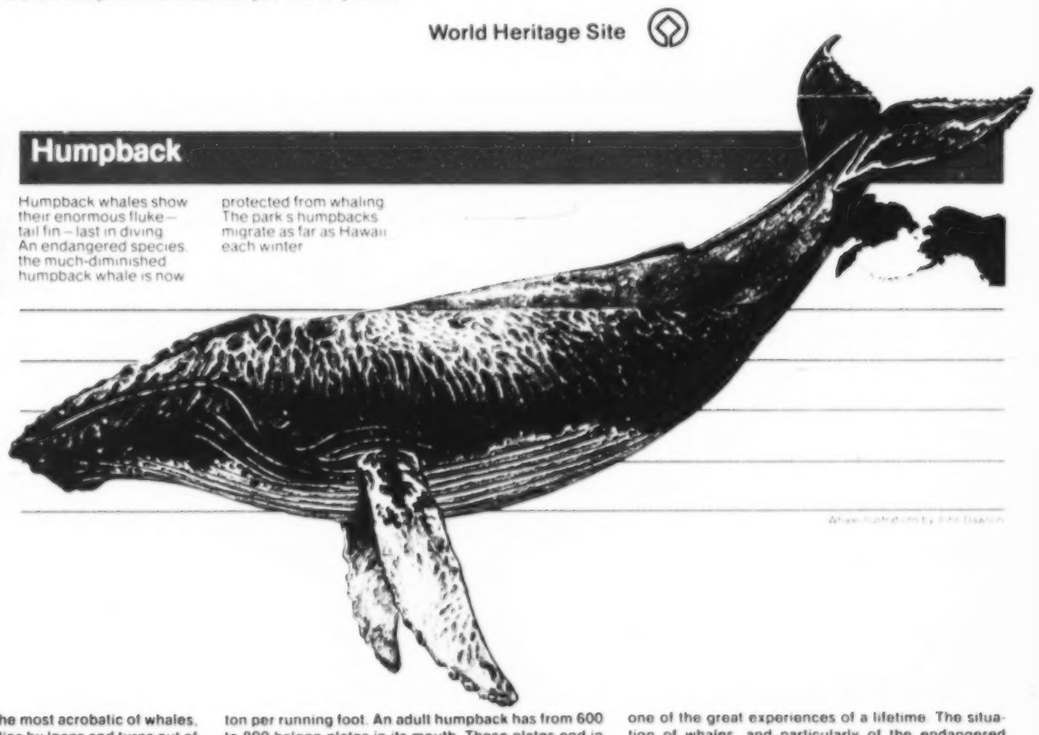
Orcas, also known as killer whales or wolves of the sea, show distinctive black-and-white markings. Their large dorsal fin is also distinctive

Carnivores, orcas feed on fish and many other marine animals



Humpback

Humpback whales show their enormous fluke—tail fin—last in diving. An endangered species, the much-diminished humpback whale is now protected from whaling. The park's humpbacks migrate as far as Hawaii each winter



The World of Whales

Whales, symbolizing the struggle to preserve nature, include the largest creatures our world has known. Blue whales weigh up to 140 tons. Sixty to 100 million years ago the ancestors of today's whales were land-dwelling, warm-blooded, air-breathing mammals who successfully returned to the seas to live. Alaskan waters boast 10 species of baleen whales and 5 toothed whales. Glacier Bay waters include baleen whales, the minke and humpback, and one toothed, the orca. The whale's appeal mixes familiarity and strangeness. Whales often live in family groups, aid each other in distress, and communicate with each other. Many observers credit whales with rational thought.

Minke whales are thought to be quite migratory and are more at home in cold northern waters than most baleen whales. (Baleen whales are named for how they feed, which is described below, under the entry for humpback whales.) Cod and pollock are their main diet here. Farther south minkes favor krill. The upper size limit of minke whales in northern waters is 33 feet. Among large whales, minkes are fast swimmers, making speeds up to 20 miles per hour. As whaling has depleted more favored species, the rich-meated minke has become the most heavily taken of baleen whales today. Their North Pacific population appears to have declined to between one-fourth and one-third its pre-whaling numbers.

Orca whales feed on various marine animals, including fish, sea lions, seals, porpoises, sharks, squid, and other whales. Also called killer whales, orcas can hunt in teams and have killed blue whales, the world's largest animals. Male orca whales average about 23 feet long; the females less. They have no natural enemies. Thought to be highly intelligent, orcas are readily trained in captivity. They can swim at a steady 29 miles per hour. Their distinctive, largely triangular dorsal fin may reach nearly 6 feet high on old males.

Humpback whales are the most acrobatic of whales, heaving their massive bodies by leaps and turns out of the water. Humpbacks are both cosmopolitan—found in all oceans—and endangered. Only about seven percent of their pre-whaling numbers remain. Coastal feeders who love shorelines, bays, and fjords, they are naturals for Alaska, which boasts nearly 34,000 miles of tidal shoreline. Humpbacks feed here on krill, shrimp, and various fish, including capelin. Humpbacks feed heavily because, unlike most birds and mammals, they do not feed year round. Humpbacks must store enough fat in summer to last the rest of the year. Adults average 40 to 50 feet long, females being the larger. Adults weigh in at about three-quarters of a ton per running foot. An adult humpback has from 600 to 800 baleen plates in its mouth. These plates end in bristles. In the feeding process, huge masses of sea organisms are scooped into the mouth. Then the water, some 150 gallons at a shot, is expelled while the plates filter *in* the edibles. Were you to stare into a humpback's mouth—which opens to 90 degrees—you might not readily discount the Biblical mishaps of Jonah. Glacier Bay humpbacks have been observed working singly or in pairs to cast a "net" of bubbles about their prey and then harvesting the hapless creatures—probably shrimp and other slower-moving organisms—caught in their airy illusion. To see these large whales in their native habitat surely counts as one of the great experiences of a lifetime. The situation of whales, and particularly of the endangered humpback whales, in Glacier Bay has recently been under intensive scrutiny by scientists. The purpose of the studies has been to learn enough about these awe-inspiring creatures to protect them. The numbers of whales present can vary dramatically from year to year. Whether these variations are wholly natural or not is uncertain. Historically, most of the available information about whales derives from attempts to hunt them, not to save them from extinction.

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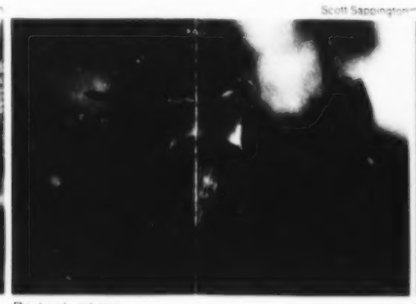
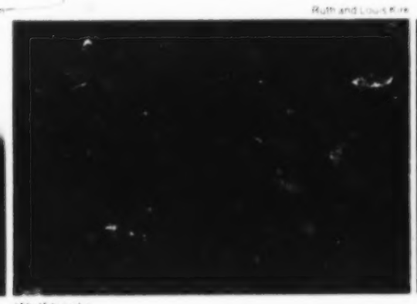
Horned grebe

Baneberry

Moose



Red columbine



Wolf tracks

Skunk cabbage

Guillemots

Plants and Animals Return to the Land

Scientists and other observers came to Glacier Bay to see the great glaciers and found here the ideal natural laboratory for the study of the infant theory of plant succession. How do plants recover a raw landscape? What happens when nature wipes the slate clean and starts over from scratch? Glacier and plant studies go hand in hand. Rapid revegetation following the glaciers' speedy retreat has enabled us to map and photograph the course of plant succession. When naturalist John Muir came to Glacier Bay in 1879 he was seeking corroboration of the continental glaciation theories of Louis Agassiz, whose controversial *Études sur les Glaciers* was published in 1840. Here, in the aftermath of retreating glaciers, Muir found a landscape not yet formed. At Glacier Bay you watch a vegetative wilderness being created—and also see its culmination in coastal forest. A trip up bay mimics glacial retreat and rolls back plant succession, from the mature forest at Bartlett Cove to the naked Earth structure at the fjords' farthest reaches. Biological succession produces profound change here in a mere decade. Earnest, long-range studies of plant succession began in Glacier Bay in 1916, with the work of Prof. William S. Cooper. His plant studies were continued in 1941 by Prof. Donald Lawrence and others. Plant recovery may begin here with no more than "black crust," a mostly algal, feltlike nap that stabilizes the silt and retains water. Moss will begin to add more conspicuous tufts. Next come horsetail and fireweed, dryas, willows, alder, then spruce, and finally hemlock forest. In many areas the final or climax stage of plant succession may be the boggy muskeg, but this may take hundreds of years to develop, after the establishment of hemlock-spruce forest. Where plant's seeds happen to land can be critical. The chaotic rock-and-rubble aftermath of a glacial romp is deficient in nitrogen. Alder and dryas are important pioneers because they improve the soil by adding nitrogen to it. Much of northern Europe and America were pioneered by dryas when the last Ice Age ended. Sitka alder begins to form dense entanglements that are the bane of hikers. Spruce takes hold and eventually shades out the alder. A forest community is begun. Each successive plant community creates new conditions. The theory holds that plant competition modifies the environment—light and moisture availability, and soil nutrients—so that plant populations also change. Over time, successive plant communities will occupy the environment, hence plant succession. The time from naked rock to revegetation is not necessarily long.

The patterns by which animals re-inhabit the land after glaciers retreat are not as neat as with plant succession. There are no true pioneer species paving the way for succeeding species. Land mammals must either walk or swim. They cannot, as plant seeds and spores do, hitch rides on wind and waves or with birds. Extensive water, ice, or mountains loom as impassable barriers. Low mountain passes are often the conduits through which land mammals begin to repopulate the park. Usually they will live off this young terrain only part of the year at first. Then resident populations may gradually build. The process of colonization at Glacier Bay and throughout Southeast Alaska is somewhat hindered by the fact that mammals in general have not had enough time since the Wisconsin Ice Age wound down to recolonize the land.

Bears, river otters, and mink can swim around ice and open water barriers to recolonize the land as glaciers leave. Mountain goats and hoary marmots can live on high ridges the ice exposed early in its retreat. Whales, Dall porpoises, and harbor porpoises find open marine corridors to the tidewater glacier fronts. Harbor seals pup on densely packed icebergs. These animals are already widespread in the park. Others—moose and coyotes—are common in some places, absent in others. Scarce or absent here now, but not expected eventually, are Sitka black-tail deer, beavers, lynx, and snowshoe hares. Capable of flight, birds do not experience ice and open water as barriers to recolonization.

Human History

Tlingit Indians were the original inhabitants of Glacier Bay and still consider it their ancestral home. Hunters and gatherers of salmon, seals, berries and roots, they were driven from the bay by advancing glaciers during the Little Ice Age. Naturalist and adventurer John Muir is credited with discovering the bay in 1879, and tourism to this land of ice and snow began soon after. Pioneering homesteaders began farming in Gustavus around 1923, when fish canneries and salteries dotted the region. Though a few hardy men and women have chosen to live in Glacier Bay and on the outer coast in times past, the area remains largely isolated and undeveloped.

Glacier Bay

Glacier Bay National Park and Preserve
Alaska

National Park Service
U.S. Department of the Interior

A park concession tour boat will drop off and pick up campers. Brian Sudeman

Photography in this wet but cloudy-bright landscape poses special challenges. Ruth and Louis Kirk

The park can be experienced by kayak or cruise ship. Chad Soiseth

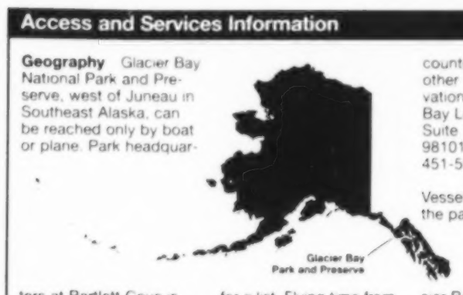
Mountaineering and glacier travel require special skills and equipment. Tom Bean

One last itinerary check in the backcountry before the pilot leaves. Ruth and Louis Kirk

Extensive open country and glaciers attract campers to Glacier Bay. Tom Bean

Access and Services Information

Geography Glacier Bay National Park and Preserve, west of Juneau in Southeast Alaska, can be reached only by boat or plane. Park headquarters at Bartlett Cove is 65 miles from Juneau. It is an additional 55 miles from Bartlett Cove to tidewater glaciers.



Concession Services Travel options from mid-May through September include scheduled and charter air services, tour boats, cruise ships, and charter boats. Some 50 companies provide services in the park; write for a list. Flying time from Juneau to Gustavus is about 30 minutes.

Lodging, groceries, a restaurant, and services are found at Gustavus. Bus or taxi service from Gustavus to the park is available.

At Bartlett Cove, Glacier Bay Lodge offers lodging, food service, fuel, a daily boat tour, backcountry drop-off, and other services. For reservations write: Glacier Bay Lodge, 520 Pike St., Suite 1610, Seattle, WA 98101; or call 1-800-451-5952.

Vessels based outside the park also tour Glacier Bay. Many large cruise ships and smaller tour vessels schedule a day in the bay in their Southeast Alaska itineraries. Charter boats offer many services. Kayak rentals are available.

There are guided kayak and backpacking trips, raft trips down the Alsek River, hunting and fishing guides, and lodging in the preserve.

General Park Information The park's visitor center, located upstairs in Glacier Bay Lodge, has an information desk, interpretive sales area, and auditorium. Exhibits illustrate natural and human history. The free park newspaper, *The Fairweather*, offers articles on local subjects. *Glacier Bay*, the official national park handbook, and other publications are for sale by the Alaska Natural History Association. Write to the park address for a list of references, maps, charts, and videos.

Exhibits near the dock highlight marine natural history and Tlingit culture. Three miles of maintained trails wind through rainforest and along the beaches. Park naturalists present evening programs and films daily in the auditorium, lead hikes in the forest and along the shore, and give talks on tour boats and cruise ships entering Glacier Bay.

Camping and Backcountry Use Campers are required to attend a camper orientation given at the visitor information center. A free campground (14-day limit) with firewood, bear-resistant food caches, and warming hut is at Bartlett Cove. No reservations are needed.

Access to the backcountry generally requires a drop off by tour boat or float plane. Filling out a backcountry use permit at Bartlett Cove before departure is required.

Kayaking the shoreline is often the easiest way to get around. There are no backcountry trails, but beaches, recently deglaciated areas, and alpine meadows offer excellent hiking. Backcountry users should be self-sufficient and fully equipped and provisioned. Cook stoves are necessary because wood is scarce and wet.

Permits are required for float trips on the international Tatshenshini-Alsek River. Write: Yakutat Ranger Station, P.O. Box 137, Yakutat, AK 99689; or call 907-784-3295 or 907-784-3370.

Boating Vessel permits are required before entering Glacier Bay from June 1 to August 31. To obtain permits, write to the park address; call 907-697-2627; or contact VHF radio—KWM 20 BARTLETT COVE. Reservations are recommended. Boating information is available at the visitor information station near the Bartlett Cove dock.

Glacial sedimentation and rapid land rise cause annual changes in water depth. Nautical charts quickly become outdated—use special care when navigating. Maintain a ¼ mile distance from tidewater glaciers. Waves from calving ice can swamp skiffs or kayaks. Bergs frequently turn over or split apart; give them a wide berth.

Fishing Fishing can be good for halibut, Dolly Varden, cutthroat trout, and salmon; an Alaska fishing license is required.

Precautions

Weather Long periods of rainy, overcast, and cool weather are normal in Southeast Alaska. Summer daytime temperatures are usually 45-65°F, but nights may cool to near freezing. To protect against hypothermia a hat, gloves or mittens, and rain gear are essential. Sturdy, waterproof footgear is desirable.

Bears Black and brown/grizzly bears are wild animals and should always be considered dangerous. When hiking, lessen your chances of an encounter by watching for bears and bear sign, making noise, traveling in groups, and avoiding travel at night.

Food, trash, and cooking gear must be stored properly. Avoid taking odorous foods. Bear-resistant food canisters are required in the non-forested areas of Glacier Bay and are available for loan. Photograph bears with a telephoto lens. A close approach is dangerous.

Insects Mosquitos and biting flies may make repellent necessary.

Giardia Even though the water looks clear, it may contain organisms that cause a debilitating intestinal disorder. Water should be boiled vigorously for at least one minute, filtered, or chemically treated.

Regulations

Natural Features Do not destroy, injure, or remove plants, rocks, shells, or other features. The harassing, injuring, or killing of any wildlife is prohibited by law. Help wildlife remain wild; never feed any animal, including squirrels and gulls.

Closures Some areas are closed or restricted because of bears, nesting bird colonies, feeding humpback whales, or other wildlife activity. Check on closures at Bartlett Cove before heading up the bay.

Pets Pets must be leashed or physically restrained at all times. They are prohibited in the backcountry.

Firearms Firearms are prohibited in Glacier Bay. They may be secured at Bartlett Cove for the duration of your stay. They are allowed only in the Preserve and the park addition. Hunting is prohibited except in the Preserve with an Alaska hunting license.

More Information
Write: Superintendent, Glacier Bay National Park and Preserve, P.O. Box 140, Gustavus, AK 99826-0140; or call 907-697-2230.

Email: glba_administration@nps.gov. Internet: www.nps.gov/glba.

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